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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARTIN ROBLES LOPEZ, et al.,

Plaintiffs and Respondents,

v.

AGNES HARUTUNIAN TRUST, et al.,

Defendants and Appellants.

B209212

(Los Angeles County  
Super. Ct. No. BC348682)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Rolf M. Treu, Judge. Affirmed in part, reversed in part and remanded with directions.

Ronald K. Granit; Dunn Appellate Law, Pamela E. Dunn and Amy J.  
Cooper for Defendants and Appellants.

Martin Robles Lopez and Francisca Montes de Oca, in pro. per., for  
Plaintiffs and Respondents.

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## ***SUMMARY***

The plaintiffs filed a complaint claiming entitlement to an easement for parking on the defendants' property. After conducting a bench trial and resolving all credibility issues in the plaintiffs' favor, the trial court entered judgment in the plaintiffs' favor. The defendants appeal, claiming the original recorded easement was either void or released, the same easement could not be granted both by grant and by prescription and the finding of a prescriptive easement is not supported by substantial evidence. Although the defendants have failed to demonstrate error in the trial court's determination of the validity of the recorded easement, we find the trial court erred in also determining the existence of a prescriptive easement. Accordingly, we affirm in part and reverse in part.

## ***FACTUAL AND PROCEDURAL SYNOPSIS***

In March 2006, Martin Robles Lopez and Francisca Montes de Oca filed a verified complaint seeking to enforce an easement appurtenant and requesting an injunction against the Agnes Harutunian Trust dated 1986 (the Trust), and Barbara Harutunian, Patricia Harutunian and Samuel Harutunian (the Harutunians), all sued individually and as co-trustees of the Agnes Harutunian Trust. Robles Lopez and Montes de Oca alleged ownership of 1106-1108 South Central Avenue in Los Angeles (also identified as Lots 157 and 158 of the Alexandre Weill Tract) and said the Trust owned 1024 South Central Avenue (Lot 156 of the Alexandre Weill Tract). They alleged entitlement to an easement comprised of three 8-foot by 18-foot parking spaces to be provided and maintained on Lot 156 to serve the users of Lots 157 and 158, and attached a copy of the recorded instrument they said granted this easement.

The document, entitled "Covenant and Agreement Regarding Maintenance of Off-Street Parking Space," and bearing a recording stamp dated August 7, 1959, bore the purportedly notarized signature of "John Harutunian" as "parking site owner" over the notation "Executor of the Estate of Sam Harutunian." The document stated in pertinent

part as follows: “The undersigned hereby certify that we are the owners of [Lot 156 located at 1024 S. Central Avenue]. And pursuant to Section 12.26 D.5. of the Los Angeles Municipal Code the undersigned hereby covenant and agree to and with said City that an off street parking area containing not less than 3 usable and accessible eight feet by eighteen feet automobile parking spaces will be provided and maintained on the above described property to serve the users of the building located at 1108 So. Central Ave. [Lots 157 and 158 Alexandre Weill Tract].

“This covenant and agreement shall run with the land and shall be binding upon ourselves, any future owners, encumbrancers, their successors, heirs or assignees and shall continue in effect so long as said building to be served is maintained without providing off street automobile parking spaces on the same lot and/or another lot as required by the provisions of the Los Angeles Municipal Code or unless otherwise released by authority of the Superintendent of Building of the City of Los Angeles.”

Robles Lopez and Montes de Oca alleged they had been operating a produce store on the dominant tenement as tenants. Then, after they bought the property in December 2003, Samuel Harutunian (Samuel) brought papers for Montes de Oca to sign. Montes de Oca does not read or speak English and refused to sign them. Samuel started to scream and “acted outrageously,” interrupting her business and intimidating her. He came back twice more, behaving the same way. “Since last year,” the Harutunians had locked the gates on their property, “on and off,” interfering with the use of the parking easement. Then, in January 2006, the Harutunians made it impossible to use the easement by stacking pallets on the parking spots subject to the easement.

The Trust and the Harutunians then cross-complained against Robles Lopez and Montes de Oca, asserting causes of action for termination of easement by conduct, abandonment, waiver, estoppel and adverse possession. Four days before the May 28, 2007 trial date, the Harutunians filed a motion in limine, asserting that the Covenant and Agreement attached to the complaint was void as John Harutunian had no interest in the property. According to the documents they attached as exhibits, they said, the Trust’s property had been owned by Sam and Agnes Harutunian as joint tenants and, upon Sam’s

death in 1958 (a decree establishing fact of death was recorded in 1960), Agnes Harutunian became the sole owner. The court continued trial to December, reopened discovery as to the validity of the 1959 Covenant and Agreement only and allowed Robles Lopez and Montes de Oca to schedule a hearing on a motion to amend their complaint. They proposed to add causes of action for an easement by prescription and to quiet title.

On December 3, 2007, the court conducted a one-day bench trial on the first amended complaint and cross-complaint. Montes de Oca testified she had been doing business as Emma's Produce at 1108 South Central for 16 years—first as a tenant at that address and then as owner of the property.<sup>1</sup> During that time, she (as well as her customers, tenants and delivery trucks) had always parked on the adjacent lot (owned by the Trust) as the property manager told her she could. Except for vacations, she worked every day of the week, operating the business from 5:00 to 3:00. During the 1990s, the Harutunian lot was not ever locked. It never had a structure; it was always a vacant lot, and there was never a lock on the property before 2004.

In about June 2000, a recycling center began operating on the Central side of the Harutunian lot, and, at that time, a gate was installed around the Harutunian lot; a fence was also installed in the middle of the property. Montes de Oca provided electricity for the gate to be built. The property had two entrances—one on Central and one on Hemlock. Montes de Oca had been parking in “mostly” the same place on the Central side but began parking on the Hemlock side when the recycling center started. It was closed down around 2003 or 2004.

Montes de Oca knew about the parking easement on the Harutunian lot when she bought the property from Mrs. Chow in December 2003 and saw the Covenant and Agreement for the parking spaces; she would not have paid as much for the property

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<sup>1</sup> Montes de Oca's (and Robles Lopez's) testimony was translated by a Spanish language interpreter.

without the easement. Around June 2004, Samuel Harutunian told her she needed to sign some papers regarding the parking lots “which were supposedly only borrowed.” Her 17-year-old daughter interpreted for her, and she said she would not sign. He was very angry and yelled at her, saying she “would have a lot of problems.” She and her daughter were frightened. She told him to leave or she would call the police. After that, he put a lock on the gate at the Harutunian lot, locking her out. That was the first time the Harutunians put a lock on the Hemlock side.

Robles Lopez testified he had been working with Montes de Oca for the past 16 years. Prior to 2004, the Hemlock side of the gate had never been locked. A group of people would play cards and sometimes drink there almost every day for years. It was always open. Seven or eight years earlier, they heard a gunshot and saw one of the men who played cards lying dead on the ground on the Hemlock side of the Harutunian lot.

Before the recycling center started, the Central side of the Harutunian lot had always been open too. That was when the gate was installed. There had been a chain link fence but it was never locked. It was broken, down on the ground. Everything was strewn around. It was a vacant lot. It was abandoned. Throughout the 1990s, he had always entered on the Central side to park. As many as 15 cars connected to Emma’s Produce would park there. They used the Central side until the recycling center started; after that, they used the Hemlock side.

John Harutunian testified that he was 25 when his father died in 1958. He had graduated from U.S.C. with a Business degree and started helping with the family business at that time. He acknowledged signing the Covenant and Agreement and said he signed it to help the Chows (then owners of the adjoining property) with parking.<sup>2</sup>

Barbara Harutunian testified that, beginning in the 1940s, the family had operated a rubbish hauling business. When their father died in 1958, only Harry (then 26), John

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<sup>2</sup> He said he did not recall the notation “Executor of the Estate of Samuel Harutunian,” said he was not executor of his father’s estate and said no notary had been present.

and Barbara (then 23) ran the business.<sup>3</sup> John and Harry (now deceased) were “directly” involved in running the business; John was “mostly on the property.” Barbara mainly operated from home, handling accounts payable and receivable, coordinating truck repairs and answering the business phone. Agnes (their mother) would take a message if a business call came to the family home, “but that was it.”

The small building that had been on the property was demolished in the late 1970s or early 1980s when the business ended, and the property was then completely vacant. The family leased the property to various tenants over the years. There was a ten-year period when there were no tenants and the lot was padlocked. At all times, Barbara said, the property was secured. She said she visited every couple of months. The fence was always up and the gates always had padlocks on both the Central and Hemlock sides. The fencing was never broken and the locks never had to be repaired.

Sam Harutunian also testified he would visit the lot weekly when it was vacant during the 1990s and did not recall the locks were ever broken. Later he testified he visited the property once a month. Then after Robles Lopez had testified, he testified the fence may have been damaged and needed repairs at times.

After both sides had rested, the trial court directed the parties to submit their final argument in writing, stating: “The issues of credibility here are very important. And the Court wishes a detailed discussion . . . on the issue of Ms. Barbara Harutunian’s categorical statements that the fence was never damaged, was always locked, was never broken into. Mr. Sam Harutunian’s original statements that there was never damage to the fence, never broken into, that he would go there once a week. Later, there was testimony he would go there once a month at a minimum. And it was not until after the testimony of Mr. Lopez that Mr. Harutunian indicated that perhaps sometimes the fence was damaged, sometimes perhaps needed to be repaired. [¶] So those are issues of

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<sup>3</sup> The two other siblings were younger. (Pat was 13 or 14 and Sam was 5.) Sam started helping in the 1960s.

credibility the Court must assess. So the parties should concentrate on that . . . [in addition to] the legal issues.”

The parties submitted closing briefs. In addition to highlighting the inconsistencies in the defense testimony, the plaintiffs argued that the recorded covenant creating the easement was valid as John Harutunian acted with actual or ostensible authority and that estoppel applied and that in any event, plaintiffs had acquired an easement by prescription. The defendants argued the Covenant and Agreement was invalid as John Harutunian had no interest in the property and the plaintiffs had failed to satisfy the elements for a prescriptive easement.

After taking the matter under submission, the trial court issued its tentative decision, finding in favor of the plaintiffs and against the defendants on all issues for the reasons set forth in the plaintiffs’ opening and reply briefs, specifically stating: “The Court resolves all issues of credibility against Defendants and for the Plaintiffs.”<sup>4</sup> Thereafter, the trial court entered judgment (as amended to include costs) in favor of Robles Lopez and Montes de Oca on all claims, finding as follows: “The Covenant and Agreement Regarding the Maintenance of Off Street Parking Space (hereinafter ‘Covenant’), dated August 7, 1959 and recorded in Official Records of the County of Los Angeles . . . attached hereto as Exhibit 1 IS VALID; and . . . Independent of the above described Covenant, Plaintiffs [Robles Lopez and Montes de Oca], owners of real property located at 1106-1108 South Central Avenue, are the legal owners of an Easement consisting of three usable and accessible eight feet by eighteen feet automobile parking spaces to be maintained on the property located at 1024 S. Central Ave. . . . to serve the users of the buildings located at 1106-1108 South Central Ave. . . .”

The court quieted title to the easement to Robles Lopez and Montes de Oca, ordering the easement shall run with the land and shall be binding on all current and future owners, with the Harutunians permanently enjoined from interfering with or

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<sup>4</sup> No statement of decision was requested or prepared.

obstructing Robles Lopez and Montes de Oca's use of the easement and ordering them to immediately remove all pallets blocking the easement and to provide a key to the gate to allow access to the easement.

The Harutunians appeal.

## ***DISCUSSION***

According to the Harutunians, the 1959 "Covenant and Agreement Regarding the Maintenance of Off-Street Parking Space" was void because John Harutunian had no interest to convey and there was no evidence he acted as his mother's agent when he signed that document. This argument ignores the record as well as the standard of review.<sup>5</sup> The contention that John lacked such authority amounts to a challenge to the sufficiency of the evidence. (*Tomerlin v. Canadian Indemnity Co.* (1964) 61 Cal.2d 638, 643.) Therefore, we determine only whether the record contains any substantial evidence to support the findings of the trial court. (*Ibid.*)

According to the Harutunians' own testimony, their mother's role in the family business was limited to answering the phone and taking messages when business calls sometimes came to the family home.<sup>6</sup> When their father died in 1958, John, Harry and Barbara ran the business. Barbara testified she mainly operated from home (handling accounts receivable and payable, answering the business phone and handling truck repairs) while John (who had graduated from U.S.C. with a Business degree) and Harry were "directly" involved in running the business. It was "[a]bsolutely" John who was

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<sup>5</sup> Similarly, their assertion that "[t]he only credibility issue the court resolved was when and if there was a fence on the Property before 2004" ignores the record as well. In its tentative decision, without qualification, the trial court expressly stated: "The Court resolves *all issues of credibility* against Defendants and for the Plaintiffs." (Italics added.)

<sup>6</sup> Indeed, in their opening brief, they say their mother had "minimum involvement" with the business.

“mostly on the property[.]” John acknowledged signing the 1959 Covenant and Agreement to help the Chows (the property owners from whom Montes de Oca and Robles Lopez purchased the property) with parking. His signature is on the line after the form language “Signature of parking site owner.”

As the Harutunians acknowledge, agency may be implied from the conduct of the parties. (*Van’t Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571.) “Actual authority is such as a principal intentionally confers upon an agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess. (Civ. Code, § 2316.) Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. (Civ. Code, § 2317.) An agent will normally have the authority to do everything necessary or proper and usual in the ordinary course of business for effecting the purpose of his agency. (Civ. Code, § 2319.) Authority may be granted to an agent either by a precedent authorization or a subsequent ratification. (Civ. Code, § 2307.)” (*Id.* at p. 572, citation omitted.) Proof of authority may be established by circumstantial evidence. (*Id.* at p. 573.) On this record, there was considerable evidence to support the trial court’s determination the 1959 Covenant and Agreement was valid as the evidence supported the conclusion John acted as his mother’s agent in signing that document.

The Harutunians also argue that, under the “equal dignities” rule, their mother would have had to have provided written authorization for John to act on her behalf because the statute of frauds requires a grant of an easement to be in writing. Because this argument is raised for the first time on appeal, it has been waived. (*Durbin v. Hillman* (1920) 50 Cal.App. 377.) Moreover, their assertion there was no evidence of reliance by the Chows is contradicted by the Harutunians’ own testimony as well. As the Harutunians argued in their own opening brief, Sam Harutunian’s testimony established that, around the time John signed the 1959 Covenant and Agreement, “the Chows expanded the existing structure on Lots 157-158 and constructed another building for their wholesale beverage distribution business, Sanitary Beverages. . . . [¶] To get a building permit to expand their facilities, the Chows needed to prove that they had three

extra parking spaces to satisfy the City's land use requirements for a certificate of occupancy."

According to Sam's testimony, although he learned of the Covenant in early- to mid-2000 and was "very" "friendly" with the Chows, he never approached them about releasing the Covenant and Agreement for parking. Rather, he waited until after Montes de Oca (who did not speak English) purchased the property in December 2003 and, representing that the parking spaces were only "borrowed," pressured her to sign the release or "have a lot of problems." (See *Tomerlin v. Canadian Indemnity Co.*, *supra*, 61 Cal.2d at p. 644 ["if a principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot be heard to assert, as against third parties who have relied thereon in good faith, that he did not intend to confer such power . . ."].) "There can be no doubt that in a proper case a person may be estopped from setting up the statute of frauds as a defense." (*Moore v. Day* (1954) 123 Cal.App.2d 134, 138.; and see Civ. Code § 3543 ["Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened, must be the sufferer"].)

We reject the Harutunians' contention that the 1959 Covenant was automatically released when the City permitted the Hemlock property. According to the express language of the document, the covenant to provide three parking spaces "shall continue in effect so long as said building to be served is maintained without providing off street automobile parking spaces on the same lot and/or another lot as required by the provisions of the Los Angeles Municipal Code or unless otherwise released by authority of the Superintendent of Building of the City of Los Angeles." Citing to Montes de Oca's testimony at one point that she "still didn't have" parking permits, the Harutunians argue "this Court can infer that at a later point, she *did* have parking permits." Otherwise, they say, the City would have cited her.<sup>7</sup> Again, the Harutunians' ignore the

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<sup>7</sup> At oral argument, for the first time, the Harutunians' counsel cited a Web site ([www.permitla.org](http://www.permitla.org)) which he said referenced 12 parking permits relevant to this determination.

standard of review. There was no statement of decision requested or prepared in this case, and on this record, the Harutunians' failed to prove termination of the covenant.

The Harutunians next argue that the trial court erred in concluding Montes de Oca and Robles Lopez had proven a prescriptive easement for the same parking spaces defined by the Covenant and Agreement. In this regard, we agree.

The party claiming a prescriptive easement must show open and notorious use that is hostile and adverse, continuous and uninterrupted for the five-year statutory period under a claim of right. (*Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 449; *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570.) "Claim of right . . . simply means that the property was used without permission of the owner of the land." (*Felgenhauer v. Soni, supra*, 121 Cal.App.4th at p. 450.) The validity of the 1959 Covenant and Agreement, expressly providing for three parking spaces on the Harutunian lot (and also including an express provision for termination of the easement for parking under specified conditions), precludes a determination that use of the same parking spaces was hostile and in the absence of the owner's express consent. (*Ibid.*)

Moreover, the existence of a prescriptive easement must be shown by a definite and certain line of travel for the statutory period. (*Warsaw v. Chicago Metallic Ceilings, Inc., supra*, 35 Cal.3d at p. 571.) "The mere traveling over land of an owner in various courses and directions for a period of five years will not suffice . . . ." (*Dooling v. Dabel* (1947) 82 Cal.App.2d 417, 424.) The trial court expressly confirmed that there was "no specific degree or longitude" for the spaces Montes de Oca and Robles Lopez would use on any given day. Further, to the extent Montes de Oca and Robles Lopez maintained they and their customers parked wherever they wanted, well in excess of the three spaces specified in the 1959 Covenant and Agreement, they have undermined their claim of a prescriptive easement. "Where an incorporeal interest in the use of land becomes so comprehensive as to supply the equivalent of ownership, and conveys an unlimited use of real property, it constitutes an estate, not an easement." (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1306, citing *Raab v. Casper* (1975) 51 Cal.App.3d 866, 876-877.)

The granting of an estate in real property requires proof of adverse possession (including the payment of taxes) which was not established here. (*Ibid.*)

***DISPOSITION***

The judgment is affirmed to the extent it upholds the validity of the 1959 Covenant and Agreement, but reversed to the extent it is based on the finding of a prescriptive easement. The matter is remanded to the trial court with directions to enter a new and different judgment consistent with this determination. The parties are to bear their own costs of appeal.

**WOODS, Acting P. J.**

**We concur:**

**ZELON, J.**

**JACKSON, J.**